TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]457

CATHERINE CARY COOK, HARRIET HUNTINGTON COOK, AND ELLENOR RICHARDSON COOK, BY H. R. COOK, THEIR GUARDIAN AND NEXT [illegible],
APPELLANTS,

vs.

BOSTON WHARF COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED [illegible], 1893.

(20,000)

(22,045)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 819.

KATHERINE CARY COOK, HARRIET HUNTINGTON COOK, AND ELLENOR RICHARDSON COOK, BY ANNA H. R. COOK, THEIR GUARDIAN AND NEXT FRIEND, APPELLANTS,

vs.

BOSTON WHARF COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, Begun and Holden at Boston, Within and for the District of Massachusetts, on Wednesday, the Twenty Third Day of February, the Third Tuesday of February Being a Legal Holiday, in the Year of our Lord One Thousand Nine Hundred and Ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 673. Equity Docket.

KATHERINE C. COOK et al., Complainants,
v.
BOSTON WHARF COMPANY et al., Defendants.

The Bill of Complaint in this cause was filed in the clerk's office on the twentieth day of December, A. D. 1909, and was duly entered at the October Term of this Court, A. D. 1909, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed Dec. 20, 1909.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

Katherine Cary Cook, Harriet Huntington Cook and Eleanor Richardson Cook, of Hartford, Connecticut, by Annah H. R. Cook, their duly appointed Guardian and next friend, and all citizens of the State of Connecticut, bring this their bill against the Boston Wharf Company, a corporation organized and existing under the laws of the State of Massachusetts, a citizen of the State of Massachusetts, and having a usual place of business in Boston, in said State, Edwin F. Atkins, of Belmont in said State, President and Director of said Company, Moses Williams, of Brookline in said State, Vice-President and Director of said Company, Joseph B. Russell, of Cambridge in said State, Treasurer and Director of said Company, Charles T. Russell, of Cambridge in said State, Assistant Treasurer and Director of said Company, and Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce and Frederic E. Snow, all of Boston in said State, Directors of said Company, all the above named being citizens of said State of Massachusetts.

And thereupon your orators complain and say as follows:

1. That they respectively are holders of fifty (50) shares each of the capital stock of the respondent, Boston Wharf Company, a cor-

poration duly organized and existing by virtue of a special Act of the legislature of the Commonwealth of Massachusetts, passed in the year 1836, and Acts in amendment thereof.

3 2. That the total capital stock of the said Respondent, Boston Wharf Company, already issued and outstanding, consists of one million two hundred thousand dollars ($1,200,000) divided into sixty thousand (60,000) shares of the par value of twenty dollars ($20) each.

3. That by virtue of the said Act of the Legislature of the Commonwealth of Massachusetts, passed in the year 1836, and Acts in amendment thereof, the said Respondent, Boston Wharf Company, is authorized to take and hold all or any part of certain lands and flats with their privileges and appurtenances lying within the limits of the City of Boston in said Commonwealth of Massachusetts, whereof the said Respondent, Boston Wharf Company, may legally acquire the property from the lawful owners of the same; to receive dockage and wharfage for vessels laid at its wharves, and, conformably to the provisions of such by-laws as shall from time to time be established by it, to make any conveyances of its corporate property, and lease, manage and improve its property in whatever manner shall be deemed expedient by it.

4. That the property and assets of the said Respondent, Boston Wharf Company, at the present time amount to more than five million dollars ($5,000,000), all of which said sum is invested in real estate.

5. That the net profits or income of the said Respondent, Boston Wharf Company, during the year ending December 31, 1908, as shown by its annual report submitted to its shareholders, amounted to the sum of two hundred twenty-three thousand dollars ($223,000) above all ordinary and necessary expenses actually paid within the year out of the income of the said Respondent, Boston Wharf Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America or the Commonwealth of Massa-

4 chusetts, all sums charged to depreciation of property, all interest actually paid within said year ending December 31, 1908, on its mortgage indebtedness, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said Respondent, Boston Wharf Company.

6. That under and by virtue of the alleged authority of the provisions of Paragraph 3 of Section 38 of an Act of Congress of the United States, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1908, the Respondent, Boston Wharf Company, is liable on or before the 1st day of March, 1910, to make a true and accurate return under the oath or affirmation of its President, Vice-President or other principal officer, and its Treasurer or Assistant Treasurer, to the Collector of Internal Revenue for the Third District of Massachusetts, setting forth:

a. The total amount of the paid up capital stock of the said Boston Wharf Company outstanding on December 31, 1909;

b. The total amount of the bonded and other indebtedness of the said Boston Wharf Company on December 31, 1909;

c. The gross amount of the income of the said Boston Wharf Company received by it from all sources during the year ending December 31, 1909;

d. The total amount of all the ordinary and necessary expenses actually paid out of the earnings of the said Boston Wharf Company in the maintenance and operation of its business and properties within the said year ending December 31, 1909, stating separately all charges by way of rentals or franchise payments required to be made by it as a condition to the continued use or possession of its property;

e. The total amount of all losses actually sustained by the said Boston Wharf Company during the year ending December 31, 1909, not compensated by insurance or otherwise, stating
5 separately any amounts allowed for depreciation of property;

f. The amount of interest actually paid by the said Boston Wharf Company within the year ending December 31, 1909, on its bonded or other indebtedness to an amount not exceeding its paid up capital stock;

g. The amount actually paid by said Boston Wharf Company within the year ending December 31, 1909, for taxes imposed under the authority of the United States or the Commonwealth of Massachusetts;

h. The net income of the said Boston Wharf Company after making all the deductions authorized in paragraphs 2 and 3 of Section 38 of the said Act of Congress above mentioned.

7. That by virtue of the before mentioned Act of the Legislature of the Commonwealth of Massachusetts, passed in the year 1836, and the By-Laws of the said Respondent, Boston Wharf Company, regularly and lawfully adopted by the shareholders of said Respondent, Boston Wharf Company, the management of the stock, property, affairs and concerns of the said Respondent, Boston Wharf Company, is committed to its Board of Directors; and the management of its financial affairs to its Treasurer; and that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States of America, entitled "An Act to provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1909, Section 38 of said Act, the Respondent, Boston Wharf Company, is liable to pay, and that the Respondent, Treasurer of said Respondent, Boston Wharf Company, intends to cause to be paid to the Commissioner of Internal Revenue for the United States of America, for the use of the said United States, on or before the 30th day of June, 1910, and on or before the 30th day of June in each year thereafter, a tax of one per cent. (1%) for the year ending
6 December 31, 1909, and for each year ending December 31 thereafter, upon the entire net income of the said Respondent, Boston Wharf Company, over and above five thousand dollars ($5,000) received by it from all sources during such year.

8. And your Orators further represent that the said provisions of Section 38 of the said Act of Congress above referred to, providing for a tax of one per cent. (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association, organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void as to the said Respondent, Boston Wharf Company, a Corporation deriving its income wholly from real estate, for the following reasons:

a. The provisions of Section 38 of said Act of Congress above mentioned originated in the Senate of the United States, and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article I, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

b. The said provisions of Section 38 of said Act of Congress above mentioned constitute a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, Section 1 thereof, in that they deprive the said Respondent, Boston Wharf Company, and its shareholders, of their property without due process of law; and further, that the said provisions impose no tax of this kind upon individual owners of real estate, and therefore that said provisions deny the said Respondent, Boston Wharf Company, and its shareholders, the equal protection of the laws.

c. The said provisions of Section 38 of said Act of Congress above referred to constitute a direct tax in respect of the property held and owned by the said Respondent, Boston Wharf Company. Whereas it is provided in the Constitution of the United States, Article I, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

d. That if said provisions of Section 38 of said Act of Congress above referred to, do not constitute a direct tax on the property held and owned by the said Respondent, Boston Wharf Company, they must be a tax upon the franchise of said Company, and Congress has no power under the Constitution of the United States to impose a tax upon franchises granted by a sovereign State of the Union.

9. That they have requested said Respondent, Treasurer of said Boston Wharf Company, both orally and in writing, to omit and refuse to pay said tax provided for in Section 38 of said Act of Congress above mentioned, and to refrain from voluntarily making any list, return or statement on behalf of the said Respondent, Boston Wharf Company, to the Collector of Internal Revenue for the Third District of Massachusetts.

10. That the said Respondent, Russell, Treasurer of the said Boston Wharf Company, has not complied with your Orators' request, but on the contrary he, with the other Respondents, Directors of said Company, as she is informed and believes, have resolved and determined to comply with all and singular the provisions of said Section 38 of the said Act of Congress above referred to, by causing the Respondents the President or Vice-President, Treasurer or Assistant Treasurer of the said Respondent, Boston Wharf Com-

pany, to make the said return to the Collector of Internal Revenue for the Third District of Massachusetts, as provided in Paragraph 3 of Section 38 of the said Act of Congress above mentioned, and by causing to be paid to the Commissioner of Internal Revenue for the United States of America, for the use of the said United
8 States, the said tax upon all the net profits or income of the said Respondent, Boston Wharf Company, as set forth in Paragraph 7 of this Bill.

11. That if the said Respondents, Directors of the said Boston Wharf Company, shall cause the Respondent, Boston Wharf Company, to pay the said tax out of its gains, income and profits, as they have proposed and declared their intention of doing, they will diminish the assets of the said Respondent, Boston Wharf Company, and lessen the dividends to be derived from its shares by its shareholders, and will thereby lessen the value of the said shares; and that a voluntary compliance with the provisions of said Section 38 of the said Act of Congress above mentioned will expose the said Respondent, Boston Wharf Company, to a multiplicity of suits by and on behalf of its numerous shareholders, and that such numerous suits will work irreparable injury to the business of the said Respondent, Boston Wharf Company, and will subject it to great and irreparable damage, to the great and irreparable damage of your Orators and all the shareholders of the said Respondent, Boston Wharf Company.

12. That the capital stock of the said Respondent, Boston Wharf Company, is divided among a large number of persons, who, as such shareholders, constitute a large body; that this Bill is filed for an object common to all of said shareholders, and that your Orators therefore bring this Bill not only in their own behalf as shareholders of said Respondent, Boston Wharf Company, but also as representatives, and on behalf of, such of the other shareholders of said Respondent, Boston Wharf Company, similarly situated and interested, as may from time to time choose to intervene and become parties to this Bill.

13. That they are now the owners and registered holders of one hundred fifty (150) shares of the capital stock of the said
9 Respondent, Boston Wharf Company, of a value exceeding the sum of Fifteen thousand dollars ($15,000), and that they became entitled to said stock upon the first of January, 1907, under the will of George Morey Richardson, late of the State of California; and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

14. That the said Respondent, Boston Wharf Company, is not engaged in interstate commerce.

15. And your Orators further represent that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of costs, the sum of two thousand dollars ($2,000), that said suit arises under the Constitution or laws of the United States, and that said suit is furthermore a controversy between citizens of different States.

Wherefore your Orators pray:

1. That it may be decreed that the provisions of Section 38 of th said Act of Congress above mentioned, providing for the impositio of a tax of one per cent. (1%) upon the entire net income over an above five thousand dollars ($5,000) of every corporation, join stock company, or association, organized for profit; and having capital stock represented by shares are unconstitutional, null an void, so far as they may apply to the said Respondent, Bosto Wharf Company, a Corporation the property of which consis wholly of real estate, and the income of which is derived wholl from real estate.

2. That each and every one of the said Respondents may be perpe ually restrained from complying with the provisions of Section 3 of the said Act of Congress above mentioned, by making any list returns or statements, to the Collector of Internal Revenue for th Third District of Massachusetts, as aforesaid.

10 3. That each and every one of the said Respondents may b perpetually restrained from complying with the provisio of Section 38 of the said Act of Congress above mentioned, by pay ing any tax of one per cent. (1%), on or before June 30, 1909, at any time thereafter, on the net earnings of the said Responden Boston Wharf Company, for the year ending December 31, 1909, t the Commissioner of Internal Revenue for the United States America.

4. That an injunction be issued by this Honorable Court restrain ing and enjoining the Respondents, and each and every one of then from making any list, return or statement, to the Collector of In ternal Revenue for the Third District of Massachusetts, in co formity with Section 38 of the said Act of Congress above me tioned, or taking any steps preliminary to making said list, return statement until the further order of this Court.

5. That this Honorable Court will decree to your Orators the costs of this suit.

6. That your Orators may have such other and further relief the nature of their case requires.

KATHERINE CARY COOK,
HARRIET HUNTINGTON COOK,
ELLENOR RICHARDSON COOK,
By ANNAH H. R. COOK,
Guardian and Next Friend.

STIMSON & STOCKTON,
HARRIS LIVERMORE,
Solicitors and Counsel for Petitioners.

11 STATE OF CONNECTICUT,
Hartford, ss:

HARTFORD, *Dec. 18th*, 1909.

Then personally appeared before me Annah H. R. Cook, th person subscribing to the above bill of complaint, and made oat that the statements subscribed by her are true, except those whic

are alleged to be on information and belief, and as to those, that she believes them to be true.

[SEAL.] J. LINCOLN FENN,
Notary Public.

(My commission expires January 31, 1910.)

12 This cause was thence continued to the present February Term, A. D. 1910, when to wit, February 25, 1910, the following Motion to Amend Bill of Complaint is filed by consent:

Motion to Amend Bill of Complaint.

(Filed by Consent Feb. 25, 1910.)

And now come your orators in the above entitled cause and move to amend their bill of complaint heretofore filed, as follows:

1. By striking out paragraph 3 thereof and substituting the following:

13 "3. That said Respondent corporation was originally chartered among other purposes for the improvement of Boston Harbor and the development of wharf facilities at the port of Boston, as appears from the following Acts of the Legislature of the Commonwealth of Massachusetts:

1836, 259,
1845, 239,
1850, 246,
1852, 171,
1852, 278,
1854, 218,
1855, 455, Section 2,
1863, 209,
1867, 354,
1874, 230,

and particularly by said Act of 1836, 259 (the original charter of said Company), 1854, 218, and 1855, 455, Section 2, which are appended to this Bill of Complaint and marked 'A,' 'B' and 'C' respectively, and to which your Orators beg leave to refer."

2. Paragraph 5, by striking out the date "1908" wherever the same occurs in said Paragraph and substituting therefor the date "1909."

3. Paragraph 6 thereof by substituting for the date "August 5, 1908," "August 5, 1909."

4. Paragraph 8, Section *b*, by striking out the words "Fourteenth Amendment of the Constitution of the United States, Section 1 thereof" and substituting therefor the words "Fifth Amendment of the Constitution of the United States."

By Their Solicitors, FREDERIC J. STIMSON.
LAWRENCE W. STOCKTON.
HARRIS LIVERMORE.

14 "A."

Acts 1836, Chapter 259.

SECTION 1. Cyrus Alger, Hall J. How, Josiah Dunham, their associates and successors, are hereby made a corporation by the name of the Boston Wharf Company, with all the powers and privileges and subject to all the duties, restrictions and liabilities set forth in the 44th chapter of the Revised Statutes passed Nov. 4, 1835.

SECTION 2. The said Corporation may take and hold all or any part of the land and flats with their privileges and appurtenances lying in South Boston, and whereof the said corporation shall legally acquire the property from the lawful owners of the same, that is to say, a parcel of land bounded and described as follows [here follows description]. And the said corporation may receive dockage and wharfage for vessels laid at their wharves; and may conformably to the provisions of such by-laws as shall from time to time be established by them, make any conveyances of their corporate property and lease, manage and improve their said property as they shall deem expedient. And the said corporation may also hold any personal property to an amount not exceeding one hundred thousand dollars.

SECTION 3. The said corporate property shall be divided into 12,000 shares of $500 each and assessments may be made from time to time thereon not exceeding the said sum of $500 on each share, and in case any proprietor shall not pay such assessments as may be laid on his share or shares, the said corporation may cause the same to be sold by public auction after 14 days' notice in one or more daily newspapers published in the city of Boston, and the surplus, if any shall remain after paying the assessments, together with
15 interest and incidental charges, shall upon request be paid over to such proprietor and the purchaser shall be entitled to a certificate of the share or shares so sold: Provided always that all assessments on the shares shall be agreed to by at least ⅔ in number of the votes of proprietors present or represented in writing at any meeting, of which meeting public notice in one or more daily newspapers published in said City of Boston shall be given seven days at least previously thereto.

SECTION 4. Each share in the said corporation shall entitle the proprietor to one vote, provided, however, no proprietor shall be entitled to more votes than ¼ of the whole number of shares.

SECTION 5. Nothing herein contained shall be construed to authorize said corporation to obstruct or encroach upon the channel or in any way to infringe or interfere with the rights of the Commonwealth in any flats in the harbor of Boston, or with the legal rights of any other person or persons.

16 "B."

Acts 1854, Chapter 218.

SECTION 1. The Boston Wharf Company is hereby authorized to extend and maintain its wharf in that part of Boston called South Boston, to the commissioners' line, of solid filling, established by an act entitled "An Act concerning the Harbor of Boston," passed May twenty-fifth, eighteen hundred and fifty-three, and shall have the right to lay vessels at the end and sides of said wharf and receive wharfage and dockage therefor: Provided, however, that this grant shall not be construed to extend to any flats or land lying in front of the flats of any other persons, or which would be comprehended by the true lines of such flats continued to the commissioners' line: and provided, also, that this grant shall not impair the legal rights of any person or corporation whatever; and provided also, that the said wharf shall be bounded on Fore Point Channel by the commissioners' line established by an act entitled "An Act concerning the Harbor of Boston," passed on the seventeenth day of March in the year of our Lord eighteen hundred and forty.

SECTION 2. The Boston Wharf Company, in making the extension and improvements authorized by this act, shall conform to any plan which may be adopted by the commissioners appointed under the authority of the present legislature, for the improvement of the South Boston Flats on the east side of Fore Point Channel.

SECTION 3. The City of Boston shall have the right to lay out such streets, with sewers under the same, as public convenience and necessity may require, on the territory over which the Boston Wharf Company is hereby authorized to construct their wharf: pro-
17 vided, however, that all such streets shall be laid out within one year from the passage of this Act.

SECTION 4. This Act shall not authorize said Company to hold any flats, which shall not be embraced between the two lines of its estate, legally extended, nor to interfere with nor to take compensation for any easement which the Legislature have already granted to any railroad or other corporation in or over said flats.

SECTION 5. The Boston Wharf Company shall pay their proportion of the expenses of making the excavations, set forth in the fifth section of the two hundred and fifty-fourth chapter of the Acts of eighteen hundred and fifty; said proportion to be assessed by the commissioner appointed under said Act.

18 "C."

Acts 1855, Chapter 455, Section 2.

SECTION 2. The Boston Wharf Company shall pay their proportion of the expenses of making the excavations set forth in the fifth section of the two hundred and fifty-fourth Chapter of the Acts of

the year eighteen hundred and fifty, said proportion to be asses
by the commissioner appointed under said act, and shall build su
avenues or streets, as the mayor and aldermen of the City of Bos
may within five years direct, on property thus made, at their o
expense.

On the same day, the foregoing Motion to Amend Bill of Co
plaint is allowed by the Court, the Honorable Francis C. Low
Circuit Judge, sitting.

Also on the same day, the following Demurrer is filed:

Demurrer.

(Filed Feb. 25, 1910.)

The Demurrer of the Boston Wharf Company, Edwin F. Atki
Moses Williams, Joseph B. Russell, Charles T. Russell, Edmund
Codman, Solon O. Richardson, Jacob W. Pierce, and Frederic
Snow to the Bill of Katherine Cary Cook, Harriet Hunting
Cook, and Ellenor Richardson Cook, by Their Guardian An
H. R. Cook.

These respondents, by protestation, not confessing any or all
the matters and things in the complainants' bill of complaint c
tained to be true, in such manner and form as the same are ther
set forth and alleged, do demur to said bill, and for cause of
murrer show that the said complainants have not in and by th
said bill made or stated such a case as entitles them in a court
equity to any discovery from the respondents, or any
19 them, or to any relief against them, or any of them, as
the matters contained in said bill or any of such matters

Wherefore, and for divers other good causes of demurrer appe
ing in the said bill, the respondents demur thereto, and humbly
mand the judgment of this court whether they shall be compelled
make any further or other answer to the said bill; and pray to
hence dismissed with their costs and charges in this behalf m
wrongfully sustained.

By Their Solicitors, GASTON, SNOW & SALTONSTALL

Certificate of Counsel.

I hereby certify that I am solicitor and of counsel for the
spondents in the above-entitled cause, and that, in my opinion,
foregoing demurrer is well founded in point of law and proper to
filed in the above cause.

FREDERIC E. SNOW,
Solicitor and of Counsel for Respondents

Verification.

UNITED STATES OF AMERICA,
District of Massachusetts:

I, Jacob W. Pierce, being duly sworn, depose and say that I am a director of the Boston Wharf Company, and as such am one of the above named respondents, and do further say that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

JACOB W. PIERCE.

Sworn to, before me, at Boston, this twenty fifth day of February, A. D. 1910.

FREDERIC D. WEBSTER,
Notary Public.

20 Also on the same day, this cause is set down for hearing and fully heard by the Court on demurrer, the Honorable Francis C. Lowell, Circuit Judge, sitting, and a memorandum of decision is filed, sustaining said demurrer.

Also on the same day, the following Final Decree is entered:

Final Decree.

Feb. 25, 1910.

LOWELL, *J.*—This cause came on to be heard upon the demurrer of the respondents to the complainants' bill of complaint and thereupon, it is ordered, adjudged and decreed that the demurrer be allowed and that the complainants' bill be and the same is dismissed, with costs to be paid by the complainants to the respondents.

By the Court:

CHARLES K. DARLING, *Clerk.*

From the foregoing Final Decree, the complainants claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, and said appeal is allowed accordingly.

A true record:

Attest:

CHARLES K. DARLING, *Clerk.*

21 *Judge Lowell's Memorandum of Decision.*

(Filed Feb. 25, 1910.)

No question is here involved but that of the constitutionality of the Corporation Tax Act. Under these circumstances, as I am not

prepared to hold the Act unconstitutional, I must sustain the de murrer.

Complainants' Appeal.

(Filed Feb. 25, 1910.)

And now come the Complainants in the above entitled caus and claim an appeal to the Supreme Court of the United States fron the decree of this Honorable Court sustaining the demurrer of th respondents.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Complainants.

The Appeal of the complainants to the Supreme Court of th United States is allowed.

FRANCIS C. LOWELL,
Circuit Judge.

Feb. 25th, 1910.

Assignment of Errors.

(Filed Feb. 25, 1910.)

1. The Court erred in ordering that the demurrer of the respond ents be allowed and in dismissing the bill of the complainants wit costs.

2. The Court erred in not holding that the provisions of Sec tion 38 of the Act of Congress referred to in the complainant's bil are unconstitutional, null and void as to the said respondent, Bosto Wharf Company, for the following reasons:

22 *a.* The said provisions originated in the Senate of th United States and were concurred in by the House of Repre sentatives subsequently thereto. Whereas it is provided by the Con stitution of the United States, Article I, Section 7, that all measure for raising revenue shall originate in the House of representatives.

b. Said provisions constitute a violation of the provisions of th Fifth Amendment of the Constitution of the United States in tha they deprive the said respondent, Boston Wharf Company, and it shareholders of their property without due process of law; and fur ther that the said provisions impose no tax of this kind upon in dividual owners of real estate and therefore that said provisions den the said respondent, Boston Wharf Company, and its shareholder the equal protection of the laws.

c. The said provisions constitute a direct tax in respect of th property held and owned by the said respondent, Boston Whar Company. Whereas it is provided in the Constitution of the Unite States, Article I, Section 9, that no capitation or other direct tax shal be laid by Congress unless in proportion to the census or enumeratio in said Constitution directed to be taken.

d. That if said provisions do not constitute a direct tax on th property held and owned by the respondent, Boston Wharf Com

pany, they must be a tax upon the franchise of said company, and Congress has no power under the Constitution of the United
23 States to impose a tax upon franchises granted by a sovereign State of the Union.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Complainants.

24 *Bond on Appeal.*

(Filed and Approved Feb. 25, 1910.)

Know all Men by these Presents, That we, Annah H. R. Cook, of Hartford, in the States of Connecticut, Guardian of Katherine Cary Cook, Harriet H. Cook, and Ellenor R. Cook, minors, as principal, and Alfred A. Ashman, of Braintree, in the State of Massachusetts, as surety, are held and firmly bound unto the Boston Wharf Company, Edwin F. Atkins, Moses Williams, Joseph B. Russell, Charles T. Russell, Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce and Frederic E. Snow, in the full and just sum of two hundred dollars to be paid to the said Boston Wharf Company, Atkins, Williams, Russell, Russell, Codman, Richardson, Pierce and Snow, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court between Katherine Cary Cook and others, and the Boston Wharf Company and others a decree was entered against the said Katherine Cary Cook and others, and the said Katherine Cary Cook and others having obtained an appeal to remove said cause to the United States Supreme Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Boston Wharf Company and others above named citing and admonishing them to be and appear in the said Supreme Court of the United States, in the city of Washington, D. C., on the third day of March, A. D. 1910.

Now, the condition of the above obligation is such, That if the said Katherine Cary Cook and others shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

ANNAH H. R. COOK, *Guardian,* [SEAL.]
By HARRIS LIVERMORE, *Attorney.*
ALFRED A. ASHMAN. [SEAL.]

Sealed and delivered in presence of
B. G. CONNER.

Approved:
FRANCIS C. LOWELL,
Circ. Judge.

This bond is satisfactory to the respondents and is approved by their counsel.

GASTON, SNOW & SALTONSTALL.

25 *Citation on Appeal.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Boston Wharf Company, a corporation organized and existing under the laws of the State of Massachusetts, a citizen of the State of Massachusetts, and having a usual place of business in Boston, in said State; Edwin F. Atkins, of Belmont, in said State, President and Director of said Company; Moses Williams, of Brookline, in said State, Vice-President and Director of said Company; Joseph B. Russell, of Cambridge, in said State, Treasurer and Director of said Company; Charles T. Russell, of Cambridge, in said State, Assistant Treasurer and Director of said Company, and Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce, and Frederic E. Snow, all of Boston, in said State, Directors of said Company, all the above named being citizens of said State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* third day of March next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein Katherine Cary Cook, Harriet Huntington Cook and Ellenor Richardson Cook, of Hartford, Connecticut, by Annah H. R. Cook, their duly appointed Guardian and next friend, and all citizens of the State of Connecticut, are appellants and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell Judge of the Circuit Court of the United States for the District of Massachusetts this twenty fifth day of February, in the year of our Lord one thousand nine hundred and ten.

FRANCIS C. LOWELL,
U. S. Circuit Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

26 *Acknowledgment of Service on Citation on Appeal.*

FEBRUARY 25, 1910.

Service of the within citation is hereby accepted on behalf of the appellees.

GASTON, SNOW & SALTONSTALL,
Solicitors and of Counsel for Appellees.

27 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court, in the cause in equity entitled,

No. 673. Equity Docket.

KATHERINE C. COOK et al., Complainants,
v.
BOSTON WHARF COMPANY et al., Defendants.

in said Circuit Court determined, a Memorandum of Decision by Judge Lowell, Complainants' Appeal, the Assignment of Errors, and the Bond on Appeal, and also the original Citation issued upon the appeal of the complainants in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twenty eighth day of February, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,045. Massachusetts C. C. U. S. Term No. 819. Katherine Cary Cook, Harriet Huntington Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, their guardian and next friend, appellants, vs. Boston Wharf Company et al. Filed March 2d, 1910. File No. 22,045.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 457

KATHERINE C. COOK ET AL., APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET AL.

MOTION TO ADVANCE CASE FOR ORAL ARGUMENT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. .

KATHERINE C. COOK ET AL., APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET AL.

MOTION TO ADVANCE CASE FOR ORAL ARGUMENT.

Come now the Appellants in the above entitled case and move that this Honorable Court may advance the said case for hearing on March 14, 1910, for the following reasons:

1. That the matters involved in said case concern the constitutionality of the provisions of Section 38 of an Act of Congress, approved August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes."

2. That this Honorable Court has advanced for oral argument on March 14, 1910, certain other cases involving the constitutionality of said Section 38 of said Act of Congress, one of which cases is entitled "*Gay* v. *Baltic Mining Company et al.*"

3. That the Respondent corporation, The Boston Wharf Company, is chartered to develop the harbor and City of Boston in the State of Massachusetts, and is engaged in business entirely within the State of Massachusetts.

4. That they therefore believe that the said case entitled *Cook et al.* v. *Boston Wharf Company et al.* involves the consideration of questions of law which arise in the said cases already advanced for oral argument, and furthermore involves additional questions of law arising under Section 38 of said Act of Congress above referred to.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Counsel and Solicitors for Appellants.

Supreme Court of the United States.

No. 849 457 October Term, 1909.

KATHERINE C. COOK ET ALS.,
APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET ALS.

BRIEF OF THE APPELLANTS, KATHERINE C. COOK et als.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Of Counsel.

BOSTON:
THE BOOKWELL & CHURCHILL PRESS.
1910.

Supreme Court of the United States.

KATHERINE C. COOK *et als.*

v.

THE BOSTON WHARF COMPANY *et als.*

BRIEF OF THE APPELLANTS, KATHERINE C. COOK et als.

I.

Admitting, for the purposes of this paragraph, that Section 38 of the Act of Congress of August 5, 1909, imposes, as it alleges, an excise tax on the doing of certain businesses, it is not "due process of law" within the meaning of the Fifth Amendment to the Constitution of the United States, in that it does not apply to individuals; and that, while it does apply to "associations," it does not apply to partnerships carrying on the same business.

The War Revenue Act of 1898, sustained in

Spreckels, etc., Co. v. *McClain*, 192 U.S. 397,

applied equally to all corporations and persons engaged in the business taxed. Moreover, it applied not, as here, to income derived "from all sources," but to "gross receipts . . . in their respective business." So, even the banknote tax law applied to notes of any *person*, state bank or state banking association "used for circulation and paid out" by national or state banks.

Veazie Bank v. *Fenno*, 8 Wall. 533, 539.

So also as to the statute of Missouri discussed in

Pacific Express Co. v. *Siebert*, 142 U.S. 339, 340,

which applied to "Any person, persons, joint-stock association, company or corporation" doing an express business.

Corporations are persons within the meaning of the Fifth Amendment and the property clauses of the Fourteenth Amendment.

Pembina Mining Co. v. *Pa.*, 125 U.S. 181, 189;
Covington Co. v. *Sandford*, 164 U.S. 578, 592;
Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150–154;
Smyth v. *Ames*, 169 U.S. 466, 522,

and, especially as to taxation, see

Railroad Tax Cases, 13 Fed. 722; 18 Fed. 385.
Southern Railway et al. v. *Georgia*, decided by this Court February 21, 1910.
Guthrie on the Fourteenth Amendment, pp. 113, 119.
Mr. Justice Field, in *San Bernardino Co.* v. *Southern Pacific R.R.*, 118 U.S. 417, 422.
N.P. R.R. v. *Walker*, 47 Fed. 681, 686.

"A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of the State."

Holmes, J., in *Carroll* v. *Greenwich Ins. Co.*, 199 U.S., 409.

In other words, corporations have all *property* rights guaranteed by the Federal Constitution, though they may not have all the personal liberty rights appropriate to natural citizens, for instance, such as are declared by Article IV., Section 2, Clause 1, of the Federal Constitution. In other respects they are citizens.

In the various constitutions the phrases "due process of law" and "law of the land" are "used interchangeably . . .

but they are synonymous"; the words of the Fourteenth Amendment confer no new rights, but add a Federal guaranty against State action; and both Fifth and Fourteenth Amendments presuppose equality before the law.

Harding v. *People*, 160 Ill. 459; S.C. 32 L.R.A. 445, 447, and cases cited.
Carroll v. *Greenwich Ins. Co.*, 199 U.S. 401, 410.
Mobile R.R. v. *Tennessee*, 153 U.S. 486, 506.
Cooley, "*Constitutional Limitations*," Sixth Edition, pp. 479–483.

"It was not within the power of the States *before* the Fourteenth Amendment to deprive citizens of the equal protection of the laws."

Cooley, *ibid.*, p. 490.

Could the laws supposed by Mr. Justice Brewer in

Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150 at p. 155,

have been enacted by the Federal Government under the Fifth Amendment?

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws." The latter phrase was but added to make clear, and with special reference to statutes, as the use of the plural in the word "laws" shows. The Fifth Amendment is the modern expression of the famous clause ending with the words "*vel per legem terrae*" in the Magna Carta of King John (Cap. 39), as amplified in the corresponding words in the Magna Carta of Henry III. (Cap. 35) two years later by the addition "*de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*" after the word "*dissaisietur*," and expressed in modern language by the words "due process of law" in Edward the Third's Confirmation of the Charter (Cap. 3) in 1354. The principle of equality before the law was even anterior to Magna

Carta, dating at least from the Charter of Liberties of Henry II. (1154). For comparison of these phrases, see

Stimson's Federal and State Constitutions of the United States, pp. 75, 80, 90.

Taswell-Langmead, English Constitutional History, Sixth Edition, quoting Coke, pp. 104–107.

Hannis Taylor, Origin and Growth of the English Constitution, Vol. II., p. 3.

Words in the Federal Constitution, as is well known, are to be construed and extended according to their full historical meaning acquired at the time of its adoption.

Cooley, Principles of Constitutional Law, Fourth Edition, p. 387.

Mattox v. *U.S.*, 156 U.S. 237,

Kepner v. *U.S.*, 195 U.S. 100,

and for a historical discussion, see

Stimson's Federal and State Constitutions of the United States, pp. 6, 7 and (as to equality before the law) p. 16.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business (save where imposed as a charter limitation by the sovereignty creating a corporation), like a simple property tax must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

II.

If not a simple excise tax on the doing of business it can only be an excise tax on the doing of business *under a corporate charter*. There can be no distinction between this and a tax on

the charter itself. For instance, if the Federal Government may not impose a tax on the amount of the capital stock authorized on the day that a State corporation charter is granted, it may not impose an annual tax on the doing of business thereunder. Neither State nor Nation — governments of equal dignity in their respective spheres — may impose such tax upon each other's corporations, save only so far as they are property taxes imposed by the States, or taxes imposed by the Federal Government in the exercise of functions otherwise constitutional. "The States cannot directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their powers."

Argument of Mr. Solicitor General Hoyt for the Government in *Spreckels Co.* v. *McClain*, 192 U.S. 404.

Collector v. *Day*, 11 Wall. 113–124.

Fifield v. *Close*, 15 Mich. 505, cited with approval in Cooley's Constitutional Limitations, Sixth Edition, p. 592.

A State may not tax the corporate franchise of a Federal corporation,

McCulloch v. *Maryland*, 4 Wheat. 316,

California v. *Central Pacific R.R.*, 127 U.S. 41,

nor may it tax its business if it be a Federal function, such, for instance, as interstate commerce; nor can a State impose a franchise tax even on the stock of corporations incorporated in other States and doing business in the State imposing the tax, if it do not tax its own corporations in the same manner.

Southern Railway v. *Georgia*, *supra*.

Western Union Telegraph Co. v. *Kansas*, 30 S.C.R. 190.

North Dakota v. *Hanson*, 30 S. C. R. 179.

A tax on a wharf company chartered by the State of Massachusetts to develop the harbor and City of Boston is peculiarly a

tax upon an instrumentality of the State. That this Wharf Company was so chartered appears from the following Acts of the Legislature of the Commonwealth of Massachusetts:

Acts 1836, Chap. 259.
Acts 1837, Chap. 70.
Acts 1838, Chap. 118.
Acts 1845, Chap. 239.
Acts 1850, Chaps. 246, 254.
Acts 1852, Chap. 171.
Acts 1852, Chap. 278.
Acts 1854, Chap. 218.
Acts 1855, Chap. 455, Sect. 2.
Acts 1863, Chap. 209.
Acts 1867, Chap. 354.
Acts 1874, Chap. 230.

It was chartered in 1836 "to take and hold all or any part of the land and flats with the privileges and appurtenances lying in South Boston . . . and the said Corporation may receive dockage and wharfage for vessels laid at their wharves" (Acts 1836, Chap. 259, Sect. 2). It is possible that shares in a land company would have been held at that time in Massachusetts to be real estate; and it is noteworthy that the stockholders of this Wharf Company are not called stockholders in this charter act, but "proprietors." So, by Section 3 of the Charter "the said corporate "*property*" shall be divided into twelve thousand shares of five hundred dollars each," and in the Act of 1838, the corporate "*property*" [not the stock] is reduced. They are not, by Section 5 of the Charter Act, to "obstruct or encroach upon the channel or in any way to infringe or interfere with the rights of the Commonwealth in any flats in the harbor of Boston." By the Act of 1837 they are authorized to buy additional land, with the same proviso as to the rights of the Commonwealth in flats in the harbor. By the Act of 1854, "The Boston Wharf Company is hereby authorized to extend and maintain its wharf in that part of Boston called South Boston to the Commissioners' line . . . and shall have the right to lay vessels at the end and

sides of said wharf and receive wharfage and dockage therefor. . . . Provided also that the said wharf shall be bounded on Fort Point Channel." By Section 2 of said Act, "the Boston Wharf Company in making the extension and improvements authorized by this Act shall conform to any plan which may be adopted by the Commissioners appointed under the authority of the present Legislature for the improvement of the South Boston flats on the east side of Fort Point Channel." By Section 3 of the same Act, "The City of Boston shall have the right to lay out such streets with sewers under the same as public convenience and necessity may require on the territory over which the Boston Wharf Company is hereby authorized to construct their wharf." And by Section 5, "The Boston Wharf Company shall pay their proportion of the expenses of making the excavations set forth in the fifth section of the two hundred and fifty-fourth chapter of the Acts of eighteen hundred and fifty, such proportion to be assessed by the Commissioner appointed under said Act."

There are naturally few decisions on the power of the Federal Government to tax instrumentalities of a State, for the reason that it has hardly been attempted except in the case of State salaries, State bonds, and the internal revenue tax upon the agents of the South Carolina Dispensary. It is submitted, however, that the long list of cases deciding the converse proposition that the States may not tax instrumentalities or powers of the Federal Government, with their reasoning, is in point; also, cases upon the power, or exclusive power, of the State or the Federal Government to control business or property in their respective spheres — as, for instance, the interference of States with interstate commerce, or the control by the Federal Government in the proper cases of wharves, bridges, and ferries. The power to tax and the power to control are not, of course, commensurate; but the recognition of power to control will in proper cases have a bearing on the question whether it is a necessary State or Federal "instrumentality."

California v. *Pac. Ry. Co.*, 127 U.S. 1.
Tel. Co. v. *Texas*, 105 U.S. 460.
Guy v. *Baltimore*, 100 U.S. 434.

Gloucester Co. v. *Pa.*, 114 U.S. 196.
Ratterman v. *Tel. Co.*, 127 U.S. 411.
St. Louis v. *Ferry Co.*, 11 Wall. 423.
S. S. Co. v. *Portwardens*, 6 Wall. 31.
Henderson v. *Mayor of N. Y.*, 92 U.S. 259.
Am. Express Co. v. *Iowa*, 196 U.S. 133.
Ry. v. *Pa.*, 15 Wall. 300.

That the Act in question imposes the tax also on United States corporations does not save it. Neither sovereignty can impose a naked tax upon corporate franchises granted by the other.

The power to impose the tax in question is "exercised for ends inconsistent with the limited grants of power in the Constitution" within the meaning of these words by Chief Justice Chase in

Veazie Bank v. *Fenno*, 8 Wall. 541.

See also

Lane Co. v. *Oregon*, 7 Wall. 71, 76.

Even Chief Justice Chase's opinion in the Veazie Bank case does not decide that Congress may impose a tax on a State corporation franchise, although "not conferred for the purpose of giving effect to some reserved power of a State."

Veazie Bank v. *Fenno*, 8 Wall. 547.

In

South Carolina v. *United States*, 199 U.S. 437,

the tax was only imposed on the agents of a State so far as they were engaged in a business constitutionally taxable and always an important branch of the Federal revenue.

"The creation of a corporation, it is said, appertains to sovereignty. This is admitted."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 410.

III.

If not an excise tax or a tax upon a corporate franchise, it must be a property tax, a direct tax imposed in part at least, upon the income derived from real and personal property, and as such invalid,

Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429; S.C. 158 U.S. 601.

The Spanish War tax, as has been said, was but a tax on business earnings.

Spreckels Co. v. *McClain*, *supra*, discussed above in I.,

while the case of *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, cited in *Springer* v. *U.S.*, 102 U.S. 586,

which itself was reversed by the Pollock case, discussed the same law (Act of June 30, 1864, 13 Stat. at Large, Sects. 105, 120), and rests on the reasoning of the Springer case. And that a direct income tax imposed upon a corporation would be equally invalid with one imposed upon a natural person, and this tax be furthermore invalid even if an income tax, for the reason that it is not imposed on natural persons, see cases cited under I.

It appears from the Record that the income of the Boston Wharf Company is entirely derived from real estate in the shape of rents or mortgage interest and that its capital is wholly invested in real estate. Therefore, this is peculiarly a case of a direct tax within the decision of the Pollock case. A corporation chartered to invest solely in real estate, and that a public utility and authorized to acquire income only by the use or sale of such real estate, if subject to this Act, is directly taxed and its " Proprietors " are directly taxed.

IV.

Is there any possibility that there be a *tertium quid* — that this tax be neither an excise tax on business under State charters nor a direct property tax, but an excise on a "commodity" either natural or existing under State statutes, such as was sustained in

Knowlton v. *Moore*, 178 U.S. 41?

For, while States can tax any commodity not an agency or function of the Federal Government, so the Federal Government may tax any "commodity" — short only of a necessary attribute of sovereignty, such as is the granting of corporate charters, either for the development of the business industry and prosperity of the State itself, its cities and towns, harbors and highways, or for ordinary business purposes.

The arbitrary taxes imposed in England in the past can be no guide to us, for they have no constitution protecting the citizen against an Act of Parliament, although invading cardinal rights, despite the judgment of Coke to the contrary. But even their Parliament has never imposed a tax upon mere divisibility.

See

Cobbett's Parliamentary History of England,

covering the years from 1066 to 1803, where the system of taxation is fully described at the end of each reign. Window taxes, taxes on carriages, or on the number of servants employed, and a thousand others, have been imposed; but never one upon the mere division of property into parts, as, for instance, on tenants in coparcenary, or joint owners not dividing their interests under a corporate franchise. So in the United States, while important instances of Federal taxation on commodities or rights may be found, —

Scholey v. *Rew*, 23 Wall. 331;
Nicol v. *Ames*, 173 U.S. 509;
Knowlton v. *Moore*, *supra*;
Patten v. *Brady*, 184 U.S. 608, —

there has hitherto been none on the mere possibility of dividing or the actual division of property, except, of course, upon the deeds or conveyances making such division. In Massachusetts there has existed legislation since the seventeenth century recognizing unincorporated proprietors of fields or wharves held in common, but no taxation has ever been imposed on such divisibility, although the creature of statute, other than the direct tax on the land itself. Thus, in 1698 we find an Act recognizing and authorizing the discontinuance of general fields,

Mass. Statutes, 1698, Chap. 12, Sect. 5;

in 1712, an Act authorizing such proprietors of "lands, wharves, or other real estate" to incorporate,

Mass. Statutes, 1712–1713, Chap. 9;

in 1785, an Act authorizing the proprietors of general fields to manage them and assess the proprietors *without* incorporation,

Mass. Statutes, 1785, Chap. 53,

but never an act taxing such right to hold them as proprietors in common.

So under the Federal Constitution, it is submitted that where property or business is non-taxable either by State or Nation, the mere division of such business or property into shares may not be taxed. There has never in England or America been a tax upon shares owned in ships, independent of the tax on the ship as a whole. If a whole apple is not taxable, the owners of the apple when halved are not for that reason taxable under due process of law.

Finally, that this is not intended for such a tax appears from the fact that insurance companies, though not having a capital stock represented by shares, are included.

V.

As to the inquisitorial provisions of this Act, whether or not they be unconstitutional as to corporations under the Fourth Amendment, they certainly remain unequal and discriminatory under the Fifth Amendment.

It is admitted that all reasonable inquisitory methods may be instituted in order to determine the assessment of a tax constitutionally imposed,

Hale v. *Henkel*, 201 U. S. 43,

but it is not only questionable, but was admitted in the debates in Congress that the requirements of this Act go far beyond such necessary inquisition.

And conceding the correctness of Mr. Justice Harlan's dissenting opinion in *Hale* v. *Henkel*, it may yet be urged that its reasoning applies only to a corporation under investigation by the sovereignty which created it. Inquisitions by other sovereignties, even for lawful purposes of revenue, must be judged by the ordinary constitutional law applicable to individuals. That is, the Federal Government in ordering this inquisition is not, as in *Hale* v. *Henkel*, conducting an investigation into the affairs of a corporation which it created, or which, by reason of the interstate commerce clause of the Constitution, is subject to its jurisdiction and control.

VI.

If the Congress have any power under the Constitution to tax the earnings and profits of State corporations and not of individuals, it is only under the Interstate Commerce law of the Constitution. Incomes or profits derived from interstate commerce by persons and corporations, or either, may, perhaps, be taxed by the Congress, — not as a direct tax, but as a prerequisite to doing such business.

This legislation, Section 38 of the Act of August 5, 1909, with the prior legislation creating the Federal Bureau of Corpo-

rations, was apparently based upon the Report to Congress of the United States Industrial Commission of 1902. All the reasons given for such legislation in the debates in Congress are there anticipated, but that report, while it recommended Federal taxation of corporations engaged in interstate commerce, carefully limited it to such.

> *Final Report, U.S. Industrial Commission*, Vol. XIX., pp. 647, 648, 649, 650, 651, 687, 691, 696, 708, 710, 715, 719, 720.

"The privilege or facility offered to a corporation to engage in interstate commerce is of two kinds: First, the privilege to be a corporation, which is derived from the State and cannot be taxed by the Federal Government, and second, the privilege to engage in interstate commerce, which is beyond the control of the States and within the control of Congress, and may therefore be taxed by the power that confers or permits it."

> *Ernest W. Huffcut on Constitutional Aspects of Federal Control of Corporations, ibid.*, p. 721.

VII.

That the provisions of this Section 38 originated in the Senate and were added to a complete bill originating in the House, appears from the House and Senate Journal.

> *H.R. (1909), No. 1438, and Conference Report, Journal of Senate (1909)*, p. 175.

It was avowedly not primarily a revenue measure, but one aimed at Federal control of corporations, and is not *in pari materia* with the rest of the House bill.

> *Message of the President, June 16, 1909, in Journal of Senate*, pp. 109, 110.

While conceding that in ordinary cases it may be impossible to investigate the history of a measure finally duly enacted into

law, there must yet be some limit to the ability of the two Houses of Congress to disregard this principle. In England it may be admitted that a violation of the Constitution in this particular can only be resented by that House whose prerogatives are infringed; as, for instance, the House of Commons in the case of the present Budget. But under our written Constitution, not only a measure contrary to its principles, but one enacted in a manner contrary to its provisions, is absolutely void. The lower House may not violate Article I., Section 7, of the Constitution by the mere act of ratification of the unconstitutional action of the Senate.

The Constitution provides (Art. 1, Sect. 5, Cl. 3) that "Each House shall keep a Journal of its proceedings. . . ." It has been held that a statute is not even *prima facie* valid when other records of which the Court must equally take notice (*i.e.*, Journals of House and Senate) show that some constitutional formality is wanting.

Cooley, J., in *People* v. *Mahaney*, 13 Mich. 481.

And in general it has been held in many States that for the purposes of ascertaining whether an act has been passed according to the forms required by the Constitution the Courts take judicial notice of records as contained in legislative journals.

State v. *Smith*, 44 Ohio St. 348.
People v. *Rice*, 64 Mich. 385.

VIII.

Constitutional authority for this section of the Act in question must be affirmatively expressed among the powers given to it by the Constitution or be necessary or proper therefor. If not so given — particularly if negatived in divers clauses of the Constitution itself — they are reserved to the States by the Tenth Amendment.

Kansas v. *Colorado*, 206 U.S. 46.

And there is a larger question than the mere revenue question here involved. Avowedly this tax is imposed for the purpose of bringing all corporations, and that immense preponderance of business, manufacturing, mining, commercial or trading now carried on by State corporations, under the supervision, control, and taxing power of the Federal Government. This high Court will consider the Act of Congress in its true intent and with full regard to its ultimate consequences, and in judging it will apply the Constitution in its broadest spirit and meaning. The people in establishing it meant to keep their ordinary property rights and domestic affairs free from control by the central Government. That question, not merely political but in the highest sense constitutional, is legitimate subject for argument.

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 403.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Of Counsel.